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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

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DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

JIM GUY TUCKER,
Attorney General of Arkansas,
ROBERT A. NEWCOMB,
Assistant Attorney General
of Arkansas,
Justice Building,
Little Rock, Arkansas 72201,
EVELLE J. YOUNGER,
Attorney General of California,
JACK R. WINKLER,
Chief Assistant Attorney
General of California,
EDWARD P. O'BRIEN,
Assistant Attorney General
of California,
JOHN T. MURPHY,
Deputy Attorney General,
of California,
State Building,
San Francisco, California 94102,

(Additional Counsel listed on inside cover)

CARL R. AJELLO,
Attorney General of Connecticut,
STEPHEN J. O'NEILL,
Assistant Attorney General
of Connecticut,
340 Capitol Avenue,
Hartford, Connecticut 06115,
ARTHUR K. BOLTON,
Attorney General of Georgia,
G. THOMAS DAVIS,
Assistant Attorney General
of Georgia,
132 State Judicial Building,
Atlanta, Georgia 30334,
JOHN C. DANFORTH,
Attorney General of Missouri,
WILLIAM F. ARNET,
Assistant Attorney General
of Missouri,
Supreme Court Building,
Jefferson City, Missouri 65101,
PAUL L. DOUGLAS,
Attorney General of Nebraska,
HAROLD MOSHER,
Assistant Attorney General
of Nebraska,
State Capitol,
Lincoln, Nebraska 68509,
WILLIAM F. HYLAND,
Attorney General of New Jersey,
JOSEPH T. MALONEY,
Deputy Attorney General
of New Jersey,
State House Annex,
Trenton, New Jersey 08625,
TONEY ANAYA,
Attorney General of New Mexico,
MICHAEL FRANCKE,
ROBERT WILLIAM PIATT, JR.,
Assistant Attorneys General
of New Mexico,
Supreme Court Building,
P.O. Box 2246,
Santa Fe, New Mexico 87501,
RUFUS L. EDMISTEN,
Attorney General of
North Carolina,
ANDREW A. VANORE, JR.,
Senior Deputy Attorney
General of North Carolina,
Justice Building,
P.O. Box 629,
Raleigh, North Carolina 27602,
LARRY DERRYBERRY,
Attorney General of Oklahoma,
AMY HODGINS,
Assistant Attorney General
of Oklahoma,
112 State Capitol,
Oklahoma City, Oklahoma 73105,
ROBERT P. KANE,
Attorney General of Pennsylvania,
J. ANDREW SMYSER,
Deputy Attorney General
of Pennsylvania,
Capitol Annex, Room 1,
Harrisburg, Pennsylvania 17120,
DANIEL R. McLEON,
Attorney General of
South Carolina,
EMMET H. CLAIR,
Assistant Attorney General
of South Carolina,
Wade Hampton Office Building,
P.O. Box 11549,
Columbia, South Carolina 29211,
JOHN L. HILL,
Attorney General of Texas,
BERT W. PLUYMEN,
Assistant Attorney General
of Texas,
Supreme Court Building,
Austin, Texas 78711.

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The State of Arkansas by Jim Guy Tucker, Attorney General and Robert A. Newcomb, Assistant Attorney General, the State of California by Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Edward P. O'Brien, Assistant General, and John T. Murphy, Deputy Attorney General, the State of Connecticut by Carl R. Ajello, Attorney

General, and Stephen J. O'Neill, Assistant Attorney General, the State of Georgia by Arthur K. Bolton, Attorney General and G. Thomas Davis, Assistant Attorney General, the State of Missouri by John C. Danforth, Attorney General, and William F. Arnet, Assistant Attorney General, the State of Nebraska by Paul L. Douglas, Attorney General, and Harold Mosher, Assistant Attorney General, the State of New Jersey by William F. Hyland, Attorney General, and Joseph T. Maloney, Deputy Attorney General, the State of New Mexico by Toney Anaya, Attorney General, Michael Francke, Assistant Attorney General, and Robert W. Piatt, Jr., Assistant Attorney General, the State of North Carolina by Rufus L. Edmisten, Attorney General, and Andrew A. Vanore, Jr., Senior Deputy Attorney General, the State of Oklahoma by Larry Derryberry, Attorney General, and Amy Hodgins, Assistant Attorney General, the Commonwealth of Pennsylvania by Robert P. Kane, Attorney General, and J. Andrew Smyser, Deputy Attorney General, the State of South Carolina by Daniel R. McLeod, Attorney General, and Emmet H. Clair, Assistant Attorney General, and the State of Texas by John L. Hill, Attorney General, and Bert W. Pluymen, Assistant Attorney General, pursuant to Rule 42, Supreme Court Rules, submit their amici curiae brief on the merits in support of the Petitioners in the above cases.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit in *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) appears in the Appendix to the Petition for Writ of Certiorari at pages 72a through 107a. The Opinion and Judgment of the United States District Court for the District of Maryland in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973) appears in the Appendix to the Petition for Writ of Certiorari at pages 1a through 58a. The Opinion and Judgment of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix to the Petition for Writ of Certiorari at pages 58a through 69a. The Opinion and Order of the United States District Court for the District of Maryland in *Stokes v. McClellan*, Civil No. 73-1192B, (April 1, 1974) appears in the Appendix to the Petition for Writ of Certiorari at pages 69a through 71a.

JURISDICTION

This Honorable Court has jurisdiction to review this cause by certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said Writ on November 3, 1975.

CONSENT OF PARTIES

This amici curiae brief is filed by the States enumerated herein pursuant to Rule 42, Supreme Court Rules and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

Whether the United States District Court for the District of Maryland may require exhaustion of adequate State administrative remedies by a prisoner filing an action pursuant to 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

MARYLAND ANNOTATED CODE

Article 41, Section 204(F):

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation and expenses.* — The Inmate Grievance Commission is established as a separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, two shall be for a term of four years, one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission

shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses, in accordance with the standard travel regulations.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.* — The Secretary of Public Safety and Correctional Services, with the advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.* — The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.* — Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) *Preliminary review.* — When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary

of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.* — Whenever, after the preliminary review provided for in subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and

conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.* — The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or institution being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be reasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of

his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complainant is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements.

INTEREST OF THE AMICI

The States enumerated herein submit this Brief since the question presented by Petitioners is equally vital to all of the Amicus States and all other States of the Union. The decision of the United States Court of Appeals for the Fourth Circuit overruled a well-reasoned and forward looking decision of the United States District Court which would have aided all States with adequate inmate grievance procedures in attempting to provide resolution of grievances in their penal institutions.

This case involves the singular question of whether a State, which has enacted adequate inmate grievance procedures for the resolution of grievances by prisoners confined to state institutions, may have the initial responsibility for resolving those grievances by requiring a state prisoner to exhaust those administrative remedies prior to filing a complaint pursuant to 42 U.S.C. § 1983. The United States District Court for the District of Maryland held in its Opinions that such exhaustion would be required based on the finding of the District Court that the Maryland Inmate Grievance Procedure was a valid and adequate remedy for the resolution of grievances. However, the United States Court of Appeals for the Fourth Circuit overruled that decision on the authority of decisions of this Honorable Court in different factual contexts.

This action by the United States Court of Appeals for the Fourth Circuit severely hampers the States from initiating their own reforms and attempting to resolve the problems of prison life. Further, in the interests of federal-state relations, and the conditions of prison life which this Honorable Court indicated should be initially resolved by state officials, Amici herein would

urge that the decision of the United States Court of Appeals for the Fourth Circuit be reversed.

STATEMENT OF THE CASE

The Amici accept and adopt the "Statement of the Case" contained in Petitioners' Brief on the merits.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES WAS NOT REQUIRED IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. *But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.* If we would guide by the light of reason, we must let our minds be bold." (Footnote omitted; emphasis supplied) *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), dissenting opinion by Justice Brandeis.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this Honorable Court discussed the intimate and frustrating

relationships which existed between inmates and correctional personnel within penal institutions.

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Preiser, supra*, at 491-92.

Nominally, the above discussion was meant to differentiate the State's interest in resolving habeas corpus cases but, in essence, was more geared to those complaints encompassed by 42 U.S.C. § 1983.

Not only has the State of Maryland instituted an adequate inmate grievance procedure, but Amici herein have either instituted, are in the process of instituting, or are studying the feasibility and desirability of comprehensive inmate grievance procedures for the purpose of resolving prisoner grievances on a state administrative level as an alternative to seeking relief in the federal courts.

Without an exhaustion requirement, experience has clearly dictated that these procedures, for the most part,

will be bypassed in favor of the attractiveness of in-court litigation. While it has been argued that effective administrative procedures will be utilized by inmates, Amici, faced with the reality of the administration of their prison systems, are not so naive as to believe that the majority of inmates will voluntarily use the grievance procedures. Thus far, twenty-three States have instituted grievance procedures and in three States, inmate unions have gained recognition as bargaining agents.[1] These forward looking steps are a

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[1] A. Arkansas has recently established a grievance procedure consisting of three administrative review officers and an appellate procedure within the institution. This procedure is not intended to be a complete alternative to seeking relief pursuant to 42 U.S.C. §1983. However, the Attorney General's Office and the Department of Correction are currently studying the methodology, feasibility, and desirability of establishing a comprehensive grievance procedure as an adequate alternative to and an indispensable prerequisite for an action under 42 U.S.C. § 1983.

B. In California, inmate appeal and review processes are formalized in official regulations. The California Department of Corrections has established systems for administrative appeal of disciplinary actions (BP-4515) and for administrative review of decisions, conditions, and policies affecting inmate welfare (BP-1103). Also established are procedures for administrative review of grievances concerning mail (DP-2412). The California Adult Authority has adopted a multi-level review process for inmate appeals from all board decisions including those on parole and term fixing (Chairman's Directive 75/32). The California Youth Authority has a grievance review procedure of departmental actions (IM 9-22-75) and an appeal system for all decisions and actions of the board (BPM Sec. 36).

C. Connecticut's Ombudsman is selected by private, non-profit agencies and functions independently of the agency that he moniters. ~~Further, an inmate union has gained recognition as a bargaining agent in Connecticut~~.

D. The State of Florida has established an inmate grievance procedure under Inmate Treatment Directive No. 31 (7-1-74) issued pursuant to Florida Statutes, Chapter 944.09. Griev-

result, not only of the realities of the situation, but a feeling on the part of Amici that they should correct

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ances are formerly submitted to the assistant superintendent within 30 days of their occurrence. He then either handles it personally or orders an investigation. Institutional officials have 30 days within which to respond to the inmate. If the grievance is not resolved the inmate may appeal to the Director, who has 30 days to make a response. Records are kept of all grievances, responses and appeals.

E. In Georgia, inmate grievance procedures are authorized by Rule No. 125-1-2-14, State Board of Corrections. The mechanics are outlined in a memorandum from the Commissioner of Corrections to all state institutions dated December 2, 1974. The grievance is first submitted to the Deputy Warden/Superintendent to review and investigate. He may hold a private conference with the inmate to discuss a solution to the problem. Appeal to the Warden/Superintendent is the next step in the process. Then if the inmate is still dissatisfied, he may appeal to the Regional Director within 5 days. The Regional Director has 30 days to respond and route the grievance back to the Deputy Warden/Superintendent for possible conferences. Finally, the inmate may appeal to the Commissioner of Corrections and subsequently to the state courts.

F. Hawaii has a state Ombudsman who is selected by the legislature. The program operates on a state-wide level.

G. An inmate in Idaho may seek review of the decision of the adjustment committee (punitive) or Classification Committee (administrative classification) by the Chief of Habilitation within 3 days. Next, he may appeal to the Warden who has 5 days to respond, and then to the Director of Corrections, who has 10 days to render a decision. Finally, the inmate may appeal to the Board of Correction which will review the case at its next meeting (about 6 times yearly). Idaho's program is administrative with no supporting legislation.

H. Pursuant to Illinois Revised Statutes, Chapter 38, 1003-8-8, the Director of the Illinois Department of Corrections is required to "establish procedures to review grievances of committed persons." Regulation Number 45 of the Administrative Regulations implements the statutory directive. It establishes a system whereby the inmate first files with the personnel in the institution where he is confined. Then the

their own problems as indicated in *Preiser, supra*, and as a further result of the forward looking suggestions of

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matter is reviewed by the Institutional Inquiry Board, which meets weekly and where the inmate may appear. A written report of its findings must be filed within 10 days. These findings are then reviewed by the chief administrator officer of the institution where the grievance arose. That officer has 5 days to render a decision and an appeal lies to the assistant director of the adult division of the Department of Correction and to the Director of the department, who may affirm or refer the matter to the Administrative Review Board. Ultimate findings and recommendations are to be embodied in reports filed with the director and the assistant director, subject to their final determination.

I. In Iowa, the Ombudsman is an investigator for the Citizens' Aid and is selected by the Legislature. Like Connecticut's Ombudsman, Iowa's version contemplates that the Ombudsman will function independently of the agency under investigation.

J. Louisiana has a purely voluntary grievance procedure not established by statute.

K. In Massachusetts, the state has recognized inmate unions and negotiates with them.

L. Michigan has also recognized an inmate union and negotiates with it.

M. Minnesota also has an Ombudsman for corrections and a staff inmate counsel at the State prison. The office of Ombudsman was created by Minnesota Statutes, Section 241.41 (1974) Laws of Minnesota, 1973, Chapter 553, §5. He has the power to investigate complaints, order persons to appear, give testimony and produce documents, and bring actions in the appropriate state court. He may receive complaints about actions of any administrative agency or on his own motion, initiate and investigate such action. After investigation, he makes recommendations to the agency. His conclusions and suggestions may be published by transmitting them to the Office of the Governor.

N. Missouri's Inmate Grievance procedures are outlined in a memorandum from the Department of Corrections to all State institutions dated June 28, 1974, Bulletin No. 55. An inmate is given 30 days to file his complaint with the director of the division, who will refer it to the director of program services or support services, who then has 15 days to

Chief Justice Burger and the recognition of reality as indicated by Justice Powell in *Procunier v. Martinez*,

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investigate the case and prepare a report. If it is not resolved there, the matter is referred to the director, who may appoint a panel of three to consider the problem. One of the members of the panel must be a citizen outside the Division of Corrections agreeable to both the inmate and the Division. If an inmate is still dissatisfied, the matter is submitted within three days to the director. If not referred to a panel at the outset, the director has 30 days to render a decision.

O. Nebraska has instituted an administrative grievance procedure to resolve inmate grievances at their correctional facilities.

P. The New Hampshire State Prison in Concord, New Hampshire, has had in effect since May, 1973 an Inmate Grievance Procedure. Annually, the members of the general prison population elect approximately 18 "shop representatives." They, in turn, appoint 5 spokesmen who meet with the warden on a bi-weekly basis and, when necessary, with the deputy warden or chief custodial officer. The meeting agenda encompasses a full range of topics; of central concern is the presentation, discussion and attempted resolution of inmate grievances.

Q. New Jersey, while without enabling legislation for an inmate grievance procedure, does have an Ombudsman who examines complaints of state prison inmates.

R. In New Mexico, an inmate must submit his grievance to grievance officers who then refer the same to case workers. A case worker has 5 days to respond and the inmate may appeal to a 3 member grievance committee which has 10 days in which to act. Finally, he applies to the corrections commission which must act at its next regularly scheduled meeting, provided the grievance is submitted at least 5 days prior thereto. Records of findings and actions taken are kept at each level.

S. New York has recently established a comprehensive inmate grievance procedure pursuant to chapters 865, 866, and 867 of McKinney's 1975 Session Laws of New York. Guidelines for the inmate grievance procedures are currently being drafted and a program should be operational by February 5, 1976.

T. Under Article 11, General Statutes of North Carolina, §§ 148-101-113, North Carolina has established a 5 member

___ U.S. ___, 94 S. Ct. 1800, 1807, Fn. 9 (1974). *See also, Report On The Federal Judicial Branch — 1973*, 59 A.B.A.J. 1125.

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inmate grievance commission, which conducts hearings on those complaints found to be meritorious. The Statute also provides for a review of the commission's decisions by the Secretary of Correction and eventually by the State courts. At the hearings, the inmate has the right to be present, cross examine witnesses, and be represented by an employee of the Department of Correction.

U. Ohio has a state-wide Ombudsman Program.

V. Oregon has an Ombudsman Program similar to that of Hawaii, but the Ombudsman in Oregon is appointed by the Governor.

W. Rhode Island has recognized an inmate union and negotiates with it.

X. South Carolina has a state-wide Ombudsman Program.

Y. By a Directive effective July 14, 1975, the Director of the Texas Department of Corrections has instituted an administrative grievance procedure. If a formal resolution of a complaint between an inmate and staff cannot be made, the inmate files a formal written complaint to the unit warden within thirty days from the date on which the events which form the basis of the complaint occurred. The unit warden must respond within 15 days from the receipt of the complaint in writing, and sooner, if the same is of an emergency nature. If the inmate is dissatisfied with the unit warden's response, an appeal lies to the Director of the Texas Department of Corrections within thirty days from the receipt of the warden's response. The Director then has 30 days within which to reply to the inmate. Provisions are made for a written record.

Z. Virginia's inmate grievance procedure was implemented in September, 1973 (revised November, 1974), by the Department of Correction for its own use. A prisoner first files his grievance with the officer in charge of the institution. After an investigation and hearing, if necessary, the superintendent has 8 days to respond to the inmate. An appeal then lies to the deputy director of corrections who has 15 days to reach a decision. A hearing or investigation may

A. THE DOCTRINE THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES BY A STATE PRISONER IS NOT REQUIRED IS INAPPLICABLE WHERE THERE ARE IN EXISTENCE ADEQUATE STATE ADMINISTRATIVE REMEDIES.

In *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973), the United States District Court for the District of Maryland found that the remedy provided by the Maryland Inmate Grievance Commission, established pursuant to Article 41, Section 204F, Maryland Annotated Code was an adequate remedy and that a state prisoner must exhaust those administrative remedies prior to filing an action pursuant to 42 U.S.C. § 1983. *McCray, supra*, 367 F. Supp. 1208, 1210; *see also Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973) and *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974). Although the majority opinion did not reach the adequacy of the administrative remedy in *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975), Circuit Judge Widener, in his separate opinion, stated that that Court had not yet been faced with a factual situation similar to that presented, that is, an adequate administrative remedy. *McCray, supra*, 516 F.2d at 377.

In *Hayes v. Secretary*, 455 F.2d 798 (4th Cir. 1972), the Fourth Circuit, when faced with the exhaustion question in a civil rights action based on Maryland's Inmate Grievance Commission, stated that the time was not yet ripe to discuss exhaustion, as the Inmate Grievance Commission was not fully operative at the

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be conducted if necessary. The decision of the deputy director is final.

AA. In Wisconsin, inmates may refer their complaints to the warden who may convene the staff inmate commission to consider the complaints and make recommendations. There is also an assistant attorney general who functions as a specially appointed investigator who reviews the complaints.

time of that case. 455 F.2d at 800. While overruling the District Court in this case, the Fourth Circuit recognized the factors identified by the District Court in *McCray* and *Washington* when the District Court required exhaustion, but was ". . . constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of controlling adjudications on the subject." *McCray, supra*, 516 F.2d at 360. Interpreting prior decisions of this Honorable Court to hold that exhaustion could never be required without a re-evaluation of policy, the majority of the Fourth Circuit declined to impose that requirement on state prisoners filing under 42 U.S.C. § 1983 in Maryland.

The policy considerations previously discussed and the major cases which followed *Monroe v. Pape*, 365 U.S. 167 (1961), require that the presumptive conclusion of the Fourth Circuit in this case, that exhaustion may not be required, should be re-examined and modified.

In *Monroe, supra*, this Honorable Court indicated that the primary purposes of 42 U.S.C. § 1983 were to over-ride certain state laws; provide a remedy where state laws were inadequate; and to provide a federal remedy where an illusory state remedy was in existence. *Monroe, supra*, at 173-174. In that Opinion, however, it was stated that the federal remedy was supplementary to the state remedy and that a complainant need not first seek and use the state remedy. *Monroe, supra*, at 183. Literally interpreted, that would seem to have put an end to the controversy, but if the word supplementary was used in its common meaning,

then it would have rendered superfluous the second and third statutory purposes discussed in *Monroe*. *See Egner v. Texas City Independent School District*, 338 F. Supp. 931, 935-36, (S.D. Tex. 1972). Further, the remedies dealt with in *Monroe* were State judicial as opposed to administrative remedies.

McNesse v. Board of Education, 373 U.S. 668 (1963) and *Houghton v. Shafer*, 392 U.S. 639 (1968) (per curiam), involved situations with inadequate state remedies. *Damico v. California*, 389 U.S. 416 (1967) (per curiam), relied on *Monroe, supra*, and *McNesse, supra*, and did not discuss the adequacy of the State administrative remedy. In *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam), this Honorable Court, in discussing 42 U.S.C. § 1983, inserted the usual reference to the probable futility of those remedies although the remedies in that case appeared to have been state judicial remedies. *Wilwording, supra*, at 250-252.

But these five landmark cases were not without their detractors. In *Monroe, supra*, Justice Frankfurter dissented and concluded that § 1983 was meant to cover only those situations where a state agent acted pursuant to some state law, custom or usage. As Illinois had held such intrusions that occurred in *Monroe* to be illegal, the jurisdictional requisite was not met. ". . . [O]nly in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of . . ." would exhaustion not be required. *Monroe, supra*, at 237; *see also* pp. 255 and 258. Similarly, Justice Harlan indicated in *McNesse, supra*, at 678, that where state procedure provided sanctions, exhaustion should be required. Further, in *Damico, supra*, Justice Harlan again dissented and stated that the word "supplementary" as used in

Monroe, supra, was now interpreted to mean that an individual would not be required to exhaust his adequate state administrative remedies. "If this is what the majority opinion in *McNesse* meant to say, its dictim was gratuitous both in the sense that it was not compelled by the facts as the Court viewed them and in the sense that it was an incorrect interpretation of *Monroe*." *Damico, supra*, at 418. In *Wilwording, supra*, Chief Justice Burger disagreed with the summary reversal in that case and stated that the Court assumed ". . . without citation of authority that further resort to state remedies would be futile . . ." *Wilwording, supra*, at 253.

B. THE DOCTRINE OF NON-EXHAUSTION, WHILE PRESUMPTIVELY APPLYING TO ALL ACTIONS BROUGHT PURSUANT TO 42 U.S.C. § 1983, HAS BEEN ERODED AND PUBLIC POLICY REQUIRES THAT AN EXCEPTION BE MADE UNDER THE CIRCUMSTANCES OF THIS CASE.

Subsequent to *Wilwording, supra*, it was thought that the question was settled that exhaustion in § 1983 cases would not be required. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Honorable Court indicated that in certain instances exhaustion of state administrative remedies would be required. This Honorable Court found, however, in that case, that the state administrative remedies were so defective that the plaintiffs were denied due process of law. *Procunier v. Martinez, supra*, while leaving the question of exhaustion under § 1983 unresolved, did indicate that conditions of confinement in penal institutions were not readily ". . . susceptible of resolution by decree . . ." and that the courts were ill equipped to deal with these problems. *Procunier, supra*, ___ U.S. ___, 94 S. Ct. at 1807. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Honorable Court did formulate

a distinction between the due process rights of those incarcerated and those possessed by citizens in free society. *Wolff, supra*, 418 U.S. ____, 95 S. Ct. at 2977. *See also* the separate opinion of Judge Widener in *McCray, supra*, 516 F.2d at 376. Interpreting *Huffman v. Pursue*, ___ U.S. ___, 95 S. Ct. 1200 (1975), Judge Widener indicated that the ". . . all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolff*, are direct holdings that, first, prisoners' rights are special cases, and second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra*, 516 F.2d at 376 (Separate opinion of Judge Widener).

Further erosion of the non-exhaustion doctrine is found in the line of cases which have held that exhaustion of state administrative remedies might be required in certain instances. In *Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972), probationary teachers were required to exhaust their state administrative remedies when the damage was prospective. *Toney, supra*, at 957. See also *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir. 1974) and *Mondell v. Mayor and City Council*, 356 F. Supp. 76 (D. Md. 1973). Similarly, in *Pope v. State Bar of Texas*, 480 F.2d 998, 1003 (5th Cir. 1973) the United States Court of Appeals for the Fifth Circuit required exhaustion when there were adequate state administrative remedies in order to assure that § 1983 actions were ripe for adjudication. *See also Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973).

Finally, the cases which require exhaustion of federal administrative remedies prior to filing action in federal court on civil rights type complaints provide additional support for exhaustion of state administrative remedies.

See McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); *Kochie v. Norton*, 343 F. Supp. 956 (D. Conn. 1972); and *McCray, supra*, 367 F. Supp. 1200-01.

While Amici are aware of the long series of cases which have held that exhaustion is not required in a § 1983 action, they clearly agree with the summation by Judge Newman in *Kochie, supra*, when he stated that:

> "No decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies. I am reluctant to believe the law is otherwise, at least until dismissal for failure to exhaust that type of administrative remedy is held to be improper." *Kochie, supra*, at 960.

Similarly, Judge Northrop concluded that:

> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous.
>
> "Such a disposition by initial action in the federal courts is not attainable except by tortuous process, as demonstrated by these cases as well as the vast majority of other § 1983 prisoner petitions. Nor does it frustrate the original intendment of § 1983, for having taken this route the complaining

> prisoner can come to this Court with the issue of liability clearly defined on the record. Thus, the federal court can readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions." *McCray, supra,* at 1210.

In *Monroe, supra,* Justice Frankfurter, in his dissenting opinion, discussed the purpose and application of 42 U.S.C. § 1983 and distinguished it from other areas of the law where stability of decision is necessary. He equated the issue raised by litigation under § 1983 as a problem which concerned directly the system of American federalism and while recognizing that *stare decisis* was important, concluded that it was "'. . . a principle of policy and not a mechanical formula of adherance to the latest decision, however recent and questionable. . . .'" *Monroe, supra,* at 222.

In light of changed circumstances, public policy demands the re-examination of the principle that prisoner petitions under 42 U.S.C. § 1983 are not subject to exhaustion of adequate state administrative remedies. When the States have taken upon themselves the burden of resolving their own problems and have equipped themselves with the means necessary to do so, they should have the initial right to determine whether a problem exists, and if it exists, the responsibility for correcting it.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the decision of the United States Court of Appeals for the Fourth Circuit in this case be reversed and the decision of the United States District Court for the District of Maryland be affirmed.

Respectively submitted,

JIM GUY TUCKER,
Attorney General of Arkansas,
ROBERT A. NEWCOMB,
Assistant Attorney General
of Arkansas,
EVELLE J. YOUNGER,
Attorney General of California,
JACK R. WINKLER,
Chief Assistant Attorney
General of California,
EDWARD P. O'BRIEN,
Assistant Attorney General
of California,
JOHN T. MURPHY,
Deputy Attorney General,
of California,
CARL R. AJELLO,
Attorney General of Connecticut,
STEPHEN J. O'NEILL,
Assistant Attorney General
of Connecticut,
ARTHUR K. BOLTON,
Attorney General of Georgia,
G. THOMAS DAVIS,
Assistant Attorney General
of Georgia,
JOHN C. DANFORTH,
Attorney General of Missouri,
WILLIAM F. ARNET,
Assistant Attorney General
of Missouri,
PAUL L. DOUGLAS,
Attorney General of Nebraska,
HAROLD MOSHER,
Assistant Attorney General
of Nebraska,
WILLIAM F. HYLAND,
Attorney General of New Jersey,
JOSEPH T. MALONEY,
Deputy Attorney General
of New Jersey,
TONEY ANAYA,
Attorney General of New Mexico,
MICHAEL FRANCKE,
ROBERT WILLIAM PIATT, JR.,
Assistant Attorneys General
of New Mexico,
RUFUS L. EDMISTEN,
Attorney General of
North Carolina,
ANDREW A. VANORE, JR.,
Senior Deputy Attorney
General of North Carolina,
LARRY DERRYBERRY,
Attorney General of Oklahoma,
AMY HODGINS,
Assistant Attorney General
of Oklahoma,
ROBERT P. KANE,
Attorney General of Pennsylvania,
J. ANDREW SMYSER,
Deputy Attorney General
of Pennsylvania,
DANIEL R. McLEON,
Attorney General of
South Carolina,
EMMET H. CLAIR,
Assistant Attorney General
of South Carolina,
JOHN L. HILL,
Attorney General of Texas,
BERT W. PLUYMEN,
Assistant Attorney General
of Texas.